

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	
	:	
GREGORY CLARK	:	NO. 97-669

MEMORANDUM

ROBERT F. KELLY, Sr. J.

SEPTEMBER 8, 2005

Presently before the Court is Defendant's Motion to Dismiss the Indictment in the above-captioned case. Defendant contends that the indictment should be dismissed because of the long delay between indictment and arrest and because of a violation of Rule 5(a) of the Federal Rules of Criminal Procedure.

The parties agreed that in lieu of an evidentiary hearing, their Statement of Undisputed Facts should constitute the factual record for our determination of the motion. Those facts are as follows:

A. Arrest Warrants and Indictment

1. In July 1990, the defendant began serving a ten-year term of special parole as a result of a prior federal conviction. Under the conditions of the defendant's special parole, he was required to meet with his probation officer as directed.

2. In April 1994, after approximately four years of complying with his reporting obligations, the defendant stopped reporting as required by the terms of his special parole. The defendant's parole officer made attempts to locate the defendant, but could not do so.

3. On October 4, 1996, a warrant was issued by the United States Parole

Commission for the defendant's arrest. Specifically, the bases for the parole warrant were that: (1) the defendant had failed to submit his monthly supervision reports to his parole officer since April 1994; (2) the defendant had failed to report to his parole officer as directed, and that his whereabouts were unknown; and (3) the defendant had moved from his last known residence and failed to advise his parole officer of his new address. Shortly thereafter, the parole commission arrest warrant was referred to the U.S. Marshal's Service, which began its efforts to locate the defendant.

4. On December 17, 1997, the defendant was indicted on two counts of bank fraud that are the subject of this action. The indictment alleges that in or about August 1994, the defendant engaged in a scheme to defraud PNC Bank of approximately \$211,235 by depositing two counterfeit checks drawn on a PNC Bank account into the defendant's Merrill Lynch account.

5. On December 17, 1997, Magistrate Judge Welsh signed a bench warrant for the defendant's arrest. Shortly thereafter, the Federal Bureau of Investigation began its efforts to locate the defendant.

B. The U.S. Marshals Service

6. In October 1996, shortly after receiving the parole commission arrest warrant, the Marshals opened its fugitive file on the defendant. It began collecting basic information on the defendant, and entered the defendant's name into the National Crime Information Center ("NCIC") database in 1996. Entering the defendant into the NCIC effectively alerted law enforcement across the country that Clark was wanted on a parole violation, and that the Marshals Service should be contacted if law enforcement came into contact with the defendant.

7. In late 1996, the Marshals Service requested the defendant's federal prison

records, including the defendant's visitor list. The Marshals Service investigated each person on the defendant's visitor's list to see if they knew of Clark's whereabouts.

8. In late 1996, and numerous times in later years, the Marshals Service also requested driver's license information for the defendant for several states to see if the defendant had established residency anywhere. The Marshals Service also requested information from the Pennsylvania unemployment agency to check whether the defendant had received any unemployment benefits.

9. Several times in 1997, and numerous times in later years, the Marshals Service ran the defendant's identifying information through a credit database looking for contact information for the defendant. If the defendant sought to rent an apartment, for example, and the landlord ran a credit check, that credit check would show up on the credit report. The credit database check generated five possible addresses for the defendant. Using the address list generated by the credit database, the Marshals Service visited numerous locations, but were unable to locate the defendant.

10. Several times in 1997, and numerous times in later years, the Marshals Service continually checked the NCIC to see if the defendant had any contact with law enforcement. Also in 1997, and numerous times in later years, the Marshals Service also checked the defendant's criminal history to ensure that the defendant had not been arrested or incarcerated without NCIC being alerted.

11. The Marshals Service also could not locate any employment information for the defendant.

12. The Marshals Service also generated a list of all of the defendant's relatives

and friends, and their contact information. In late 1997, the Marshals Service began visiting and interviewing the defendant's family members.

a. In October 1997, the Marshals Service tracked down and spoke with defendant's father, Clifford Clark. Clifford Clark told the Marshals Service that while he spoke with his son twice a month by phone, he did not know his son's whereabouts. Clifford Clark further advised that he believed that the defendant was living out of the country. Deputy marshals also spoke with attendants at the nursing home, who stated that they had seen Clark visit his father in the past. The Marshals Service concluded that Clifford Clark was not completely forthright with his answers and appeared unwilling to provide contact information for his son.

b. Again in October 1997, the Marshals Service interviewed Melvia Robbins, the defendant's ex-wife. Robbins stated that while she divorced the defendant more than 10 years earlier, the two still remained in contact. Robbins also stated that they have several children together, and advised that their daughter, Aleia, maintained the closest relationship with the defendant. Robbins provided deputy marshals with Aleia Clark's phone number. Robbins stated that she believed that the defendant was living in Europe somewhere, but she did not know where and did not have any contact information for the defendant.

c. The Marshals Service next attempted to contact Aleia Clark, the defendant's daughter. They contacted Aleia Clark by telephone, but she flatly refused to cooperate with the Marshals Service.

13. In 1998, the Marshals Service continued to conduct checks of credit databases and the NCIC, and for driver's licenses in other states. The Marshals Service also attempted to locate Aleia Clark to speak with her again, but were unable to do so.

14. Several times in 1999, the Marshals Service checked credit databases, turning up at least one additional possible lead for the defendant. Although the Marshals Service visited this address, they did not locate the defendant.

15. In July 1999, the Marshals Service re-interviewed Melvia Robbins, the defendant's ex-wife. She stated that she had not had any contact with the defendant for years. She added however, that he told her he was going to Europe.

16. In October 1999, the Marshals Service attempted to locate the defendant's sister, Velma Clark, but she did not return any calls made to her home. Deputy marshals eventually spoke to her, and she told them that she did not know where the defendant was, although she believed that he was living somewhere in Europe (possibly Paris, France).

17. Deputy marshals attempted to locate the defendant's son, but were unsuccessful. They also conducted surveillance outside of the defendant's son's apartment building, but were unsuccessful in locating either the defendant or the son.

18. In 1999 and 2000, the Marshals Service continued to conduct checks of credit databases and the NCIC, and for driver's licenses in other states, but did not turn up additional leads.

19. In February 2001, the Marshals Service learned that the defendant had had some contact with the Department of Veterans Affairs. The Marshals Service asked that the Department of Veterans Affairs detain the defendant if he showed up at any Veterans Affairs facility.

20. A check of Veterans Affairs records showed that Clark indeed had visited a Veteran's Affairs hospital. Clark had tried to obtain a Veteran's Affairs identification card, but

his request was denied when he could not produce a home address. Clark later checked himself into a Veterans Affairs hospital for psychiatric care, and was released after 10 days.

Unfortunately, deputy marshals were not informed of the visit until after Clark was released.

Deputy marshals waited for Clark at a scheduled follow up visit the following week, but Clark did not show up. Deputy marshals asked the Department of Veteran Affairs to place a notice that if Clark contacted them, then they should immediately contact the U.S. Marshals Service.

21. In 2002 and 2003, the Marshals Service continued to conduct checks of credit databases and the NCIC, and for driver's licenses in other states, but did not turn up additional leads.

22. The 2003 search of the credit databases turned up several possible addresses for Clark. Deputy marshals visited these addresses and conducted surveillance, but did not locate the defendant. The marshals also requested that the U.S. Post Office check to see whether the defendant was receiving mail at any of these addresses.

23. Deputy marshals continued to contact Clark's various family members over the years, but each time they were met with the response that they did not know Clark's whereabouts. During the last interview with Clark's sister in 2003, Clark's daughter continued to assert that Clark was living in Paris, although separately, Clark's son-in-law admitted that Clark was not living in Paris, and he believed that he was homeless, living somewhere in Pennsylvania.

24. In 2004, the Marshals Service continued to conduct checks of credit databases and the NCIC for driver's licenses in other states, but did not turn up additional leads. The Marshals Service also remained in close contact with the Department of Veterans Affairs to track the defendants's contacts with that agency.

C. The Federal Bureau of Investigation

25. Even before the defendant was indicted, FBI agents attempted to locate the defendant. In February 1996, they visited the residence of the defendant's father, Clifford Clark, but no one answered the door.

26. After the defendant was indicted, the FBI entered the bank fraud bench warrant into NCIC. The FBI then received a package of information from its Fugitive Information Unit for leads on the defendant's whereabouts.

27. In January 1998, the FBI met with the defendant's parole officer and advised her of the bench warrant.

28. In April 1998, the FBI visited a possible address for Clark, but did not find any indication that Clark lived there. Agents also spoke to the postal carrier who had worked that route for three years, but the postal carrier did not recall a Gregory Clark living there. They also spoke to the homeowners, who stated that Clark may have stayed there for three months in 1996, but he did not leave a forwarding address.

29. In September 1998, the FBI tracked down Clifford Clark and visited his home. Clifford Clark stated that his son was living in Algeria, and before that, was living in Jamaica, Canada and Germany.

30. In October 1998, the FBI met with Velma Jean Clark, the defendant's sister, in Brookhaven, PA. Velma Clark stated that she had not seen the defendant since 1993. She added that she understood why Clark was running, because he had previously stated that he would never go back to prison.

31. In May 1999, the FBI contacted Bobbi Clark, the defendant's sister, in

Somerdale, NJ. Bobbi Clark stated that she had no contact with the defendant.

32. In June 1999, the FBI conducted various database searches for possible leads on Clark.

33. Also in June, 1999, the FBI interviewed Betty Clark, the defendant's mother, in Cincinnati, Ohio. Betty Clark stated that she has not seen Clark in 12 years and does not know where he is. Betty Clark also stated that the defendant's sister, Coronetta, also lives in Cincinnati, but that she also does not have contact with Clark. The FBI also spoke with the property manager of the apartment complex where Betty Clark lived. The manager was shown a photograph of Clark, but she did not recognize him. That same day, the FBI also interviewed Willa Mae Hayes, the defendant's aunt, who said she had seen Clark only once or twice in the past five years. Willa Mae Hayes added that she has no contact with Clark and does not know where he lives.

34. In September 1999, the FBI spoke by telephone with the defendant's father. Clifford Clark stated that he spoke to the defendant by phone last week, but did not know where Clark was. Later that month, the U.S. Attorney's Office subpoenas telephone toll records for Clifford Clark, but the records did not reveal any helpful leads.

35. In January and June 2001, the FBI visited possible addresses for the defendant, but did not locate the defendant.

36. In January 2001, the FBI met with the U.S. Probation Office to review the defendant's file for possible additional leads.

37. In May 2002, the FBI investigated another individual whose social security number the defendant may have been using, but this was not a useful lead.

38. In November 2002, the FBI contacted the Immigration and Naturalization

Agency and requested that they set up a watch in case the defendant left or entered the country.

39. In June 2002, the FBI found another possible address for Clark, but did not locate the defendant.

40. In November 2002, the FBI found another possible address for Clark but did not locate the defendant. The homeowner did, however, give the FBI some mail belonging to the defendant that was received at that address.

D. Clark's Arrest

41. The contact with the Department of Veterans Affairs eventually paid off as Clark subsequently returned to the hospital. This time, the deputy marshals were able to apprehend Clark before he left the hospital.

42. When Clark was arrested, he was asked by deputy marshals for a home address, but Clark responded that he was homeless. The deputies then asked Clark for an address where they could mail the cell phone he was carrying. Clark stated that he had no address to send the phone and no family member to receive the phone.

43. When the defendant was arrested by the U.S. Marshals Service in Philadelphia on October 6, 2004, he was arrested solely on the warrant issued by the U.S. Parole Commission, and not on the bench warrant related to the bank fraud charge contained in the indictment in this case.

DISCUSSION

The defense first contends that the delay between his indictment in December 1997 and his arrest in October 2004 are grounds to dismiss the indictment. To determine whether a defendant's Sixth Amendment right to a speedy trial has been violated, the Supreme Court has

identified four factors for Courts to consider: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the prejudice to the defendant caused by the delay. See Barker v. Wingo, 407 U.S. 514, 530 (1972). We shall consider these factors separately as follows:

1. Length of Delay

All parties agree that the length of time between indictment and arrest is sufficient to trigger consideration of a speedy trial claim. See Doggett v. United States, 505 U.S. 647, 645 & n.1 (1992).

2. Reason for the Delay

a. When Clark was indicted in 1997 he had already been running from parole authorities for over three years. (Agreed facts 2 and 3.)

b. When the bench warrant was signed by Magistrate Judge Welsh on December 17, 1997 the FBI began its efforts to locate the defendant. (Agreed fact 5.)

c. In October 1996 after receiving the Parole Commission arrest warrant, Marshals opened a fugitive file on the defendant. They began collecting basic information on the defendant and entered the defendant's name in the National Crime Information Center (NCIC) database at that time. This had the effect of alerting law enforcement across the country that Clark was wanted on a parole violation and that the Marshals Service should be contacted if law enforcement came into contact with the defendant. In late 1996 the Marshals Service requested the defendant's federal prison records, including the defendant's visitor list. The Marshals Service investigated each person on the defendant's visitor list to see if they knew Clark's whereabouts. In late 1996 and at numerous other times in later years the Marshals Service

requested driver's license information for the defendant from several states to see if he had established residency anywhere. They also requested information from the Pennsylvania Unemployment Agency. (Agreed facts 6, 7 and 8.)

d. Several times in 1997 and numerous times thereafter Marshals Service ran the defendant's identifying information through credit databases. This generated five possible addresses for the defendant. The Marshals Service visited numerous locations as a result of this but were unable to locate the defendant. Starting in 1997 and continuing for numerous times thereafter Marshals checked the defendant's criminal history to insure that the defendant had not been arrested or incarcerated without NCIC being alerted. (Agreed facts 9 and 10.)

e. The Marshals Service generated a list of all of defendant's relatives and friends and began visiting and interviewing those individuals. From the responses, the relatives and friends were clearly uncooperative with the Marshals efforts to locate defendant. (Agreed fact 12.)

f. The Marshals Service continued to contact friends and relatives of the defendants through to the year 2001. (Agreed facts 13-18.)

g. In February 2001 the Marshals Service learned that the defendant had contact with the Department of Veteran Affairs. The Marshals Service asked that the Department of Veteran Affairs detain the defendant if he appeared at their offices. (Agreed facts 19 and 20.)

h. The Marshals Service continued checks of the NCIC database, driver's license database, credit databases and contact with Clark's various family members through the years 2002, 2003 and 2004. (Agreed facts 21 through 24 inclusive.)

i. The FBI attempted to locate the defendant starting in 1996 when they visited his

relatives, met with the defendant's parole officer, and spoke with postal authorities. In 1998 the defendant's father Clifford Clark told the FBI his son was living in Algeria and prior to that he had told them he had been living in Jamaica, Canada and Germany. (Agreed facts 25-30.)

j. In 1999 the FBI contacted other relatives of the defendant who claimed not to know where he was located. At that time the defendant's father claimed not to know where the defendant was but said that he called him from time to time. The United States Attorney's Office subpoenaed the telephone records of defendant's father but they were not helpful. (Agreed facts 31 through 34.)

k. In January and June of 2001 the FBI again visited possible addresses for the defendant but could not locate him. In January of 2001 the FBI met with the U.S. Probation Office to review the defendant's file for possible additional leads. In November 2002 the FBI contacted the Immigration and Naturalization Agency and requested that they set up a watch in case the defendant left or entered the country. Later in 2002 and 2003 the FBI followed other possible leads to the defendant's whereabouts without success. (Agreed facts 35-40.)

l. The contact with the Department of Veteran Affairs eventually resulted in Clark's being apprehended before he left the hospital. At that time Clark was asked by a deputy marshal for a home address and Clark responded that he was homeless. (Agreed facts 41 and 42.)

Although the government must make some effort to locate a fugitive defendant, and bring him to trial, that effort need only be reasonable and not heroic or herculean. U.S. v. Sandoval, 990 F.2d 481, 485 (9th Cir. 1993). Where, as here, the government's inability to locate the defendant results from his own flight from justice or deliberate disappearance, that delay is properly attributed to the defendant. U.S. v. Bagster, 915 F.2d 607, 611 (10th Cir. 1990).

As the Third Circuit noted, given his status as a fugitive, Clark's speedy trial argument is disingenuous: "We find it ironical that Thompson raises this point, as by far the most substantial part of the delay between indictment and trial is attributable to the fact that Thompson was a fugitive until he was arrested on the state charges. His asserted interest in a speedy trial did not manifest itself until after he was apprehended." U.S. v. Sandini, 888 F.2d 300, 311 n.7 (3d Cir. 1989). Clearly the cause for the delay in this case was as a result of Clark's conduct.

3. Defendant's Assertion of His Right to a Speedy Trial

Clark obviously never asserted his right to a speedy trial. When a defendant knows of his indictment before his arrest but fails to take action to obtain a speedy trial the third factor weighs heavily against him. Doggett, 505 U.S. at 653. Clark was in regular contact with both his father and his sister who were both told by federal law enforcement that Clark had been indicted for bank fraud and a bench warrant had been issued for his arrest. The circumstances indicate to this Court that Clark was aware of the warrant but decided to continue to evade law enforcement. Under these circumstances Clark plainly did not want a speedy trial. This third factor weighs heavily against Clark.

4. Prejudice to the Defendant Caused by the Delay

Clark presented no specific evidence of prejudice, instead choosing to rely upon a presumption of prejudice. In Doggett the Supreme Court identified three principle types of harm arising from the delay between formal accusation and trial. These are "oppressive pre-trial incarceration," "anxiety and concern of the accused" and "the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence." 505 U.S. at 654.

Obviously the first type of harm is not present in this case and to the extent the second type of harm exists that must be attributed to Clark's failure to surrender himself to authorities. As to the third type of harm, Clark's own conduct rather than official bad faith or negligence is responsible for that harm. To reach any other conclusion in this case would reward the defendant for his intentional evading arrest on this warrant.

Based upon the foregoing I find that there is no violation of defendant's speedy trial rights.

ALLEGED VIOLATION OF FED. R. CRIM. P. 5(a)

Clark contends that the government violated Rule 5(a) by not taking him before a Magistrate Judge within a reasonable time after his arrest. However, the parties have stipulated that the arrest on October 6, 2004 was on the warrant issued by the U.S. Parole Commission and not on the bench warrant related to the bank fraud charged in the indictment in the present case. (Agreed fact 43.)

It is clear to the Court from the record papers in this case that Clark was arrested on the present bank fraud case No. Cr. 97-669 on December 1, 2004. See warrant for arrest and the return (Doc. No. 17). It is also clear that he was taken before Magistrate Judge Hart on the same day. See Doc. No. 6. There was no violation of Rule 5(a).

In any event, even if the government had violated Rule 5(a) the remedy for such a violation is not dismissal of the indictment. Rather, since the provisions of Rule 5(a) are procedural, not substantive, "the sanction imposed by federal courts for failure to comply with Rule 5(a) is suppression of statements taken during the period of 'unnecessary delay'." Govt. of the Virgin Islands vs. Gereau, 502 F.2d 914, 923 n.5 (3d Cir. 1974). See also U.S. v. Dyer, 325

F.3d 464 (3d Cir. 2003). In this case Clark does not seek to suppress any incriminating statements and recognizes that the government is not seeking to admit any such statements from Clark made during the time between his arrest on the parole violation and his appearance before the Magistrate Judge. See Defendant's memo at 8.

I find therefore that Rule 5(a) has not been violated and even if it had been the remedy would not be dismissal of the present indictment but possible suppression of evidence.

I therefore enter the following Order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	
	:	
GREGORY CLARK	:	NO. 97-669

ORDER

AND NOW, this 8th day of September, 2005, upon consideration of Defendant's Motion to Dismiss the Indictment (Doc. No. 29) and the government's response thereto, it is hereby **ORDERED** that the motion is **DENIED**.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY
SENIOR JUDGE